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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

R.M. TAYLOR, INC.,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the decision of the United States Court of Appeals for the Eighth Circuit in this case conflict with the law of Michigan which allows the theory of contract abandonment to be applied to contracts where change orders have been agreed to and which permits the theory to be applied under circumstances where evidence is presented of excessive change orders with significant detriment to the claimant, which is a question of substantial importance beyond the dispute of the parties hereto because Respondent enters into similar types of construction contracts with contractors throughout the nation, involving millions of dollars in value?

PARTIES TO THE PROCEEDING

Petitioner

R.M. Taylor, Inc. is a Missouri corporation and debtor in possession, Estate of R.M. Taylor, Inc., case No. 97-41329-11-ABF, United States Bankruptcy Court, Western District of Missouri at Kansas City, Chapter 11 proceedings. R.M. Taylor, an individual, is the sole shareholder and debtor in possession, R.M. Taylor, Inc.

Respondent

General Motors Corporation has no parent corporation and no publicly held company owns ten percent or more of its stock.

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None.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 187 F.3d 809 (8th Cir. 1999). A copy of the Opinion is included at Appendix A at 1a-15a. The District Court entered its Amended Judgment on Jury Verdict on July 6, 1998, which is printed at Appendix B at 16a-24a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Opinion on August 13, 1999. On August 26, 1999, Petitioners filed a Petition for Rehearing and for Rehearing En Banc which the United States Court of Appeals denied on September 21, 1999. An Amended Order Denying the Petition for Rehearing issued on September 23, 1999 (App. D at 29a-30a)[1]. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Petitioner, R.M. Taylor, Inc. ("RMT") is a Missouri corporation with its principal place of business in Kansas City, Missouri. RMT designed, built, and installed conveyor systems for the automotive industry. Respondent, General

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

Motors Corporation ("GM") is a Delaware corporation with its principal place of business in Detroit, Michigan. GM manufactures and distributes motor vehicles and owns numerous assembly plants throughout the United States.

RMT initiated this action on April 11, 1997, by filing a two-count Complaint against GM. The District Court's jurisdiction was based on diversity of citizenship. See 28 U.S.C. § 1332. RMT filed a Second Amended Complaint in three counts on September 12, 1997. Count I alleged breach of contract. A new Count II sought *quantum meruit* damages, alleging that the parties had impliedly abandoned certain purchase order contracts. Count III sought damages in tort for economic duress and business compulsion. The court bifurcated Count III for later disposition, leaving Count I and Count II for trial.

In its final form, Count II alleged that purchase order contracts for projects at the six GM plants at issue (Wentzville, Missouri; Arlington, Texas; Shreveport, Louisiana; Bowling Green, Kentucky; Pontiac East, Michigan; and Doraville, Georgia) had been abandoned, entitling RMT to recover in *quantum meruit* for the reasonable value of its work done on those projects.

GM needed conveyor systems at these six plants. For each project, GM and RMT executed one or more separate purchase order contracts. For each project, the "purchase order contract" consisted of several documents, including a purchase order (which lists the plant, a description of services to be provided, and the original contract price), relevant bidding documents, and GM's Construction General Conditions (the "1638 Forms"). These General Conditions were regularly used by GM in entering into contracts at its various plants located throughout the United States.

Although the 1638 Forms were revised from time to time, the provisions at issue in this action remained substantially constant. The 1638 Forms placed contractual obligations on both RMT and GM. RMT's basic obligation was to provide a completed project to GM. GM's basic obligations were to "make partial payments [to RMT] as the work progresses," subject to the terms and conditions of the applicable contract. GM could request changes by using a "bulletin procedure" or an "emergency field order," depending on the circumstances.

In Count II, RMT alleged that the purchase order contracts at each of the six projects had been abandoned by the parties as of April 11, 1997, thus permitting RMT to sue for *quantum meruit* damages to recover the value of its work and other compensable costs to that date. RMT proceeded on a theory of implied abandonment, which meant that (1) GM, by its conduct, had indicated an intention not to be bound by the original contracts, and (2) RMT had acquiesced in such abandonment. GM denied that it had abandoned any of the contracts and further denied that RMT had acquiesced in any abandonment.[2]

Considerable evidence was presented on the issue of whether GM's demands for changes in the work, or in the scope of work ("change-orders"), were so excessive in number and magnitude as to imply abandonment. Such evidence was presented throughout the trial, both as an independent basis for showing abandonment and as relevant to other issues. RMT presented evidence that abandonment

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[2] Count I, the breach of contract count, was severed by the District Court after all the evidence was presented. While the record reflects evidence on that Count submitted by both parties, such evidence is not material to this Petition.

of these contracts caused RMT to incur substantial additional costs that resulted in separate *quantum meruit* damages for each of the six projects in the net amount of $22,156,143.00. GM took the position that the contract language gave it complete license to demand unlimited change-orders, thus precluding a finding of liability based on either excessive numbers of such orders or orders for work of unreasonable magnitude.

Trial on Counts I and II of the Second Amended Complaint commenced on February 17, 1998. The trial took 13 days, involved the testimony of 29 witnesses, and produced 2,954 pages of trial transcript. The parties listed some 7,000 exhibits for trial, most of which were admitted. GM's motion for judgment at the close of RMT's case and at the close of evidence were denied.

On March 5, 1998, the jury returned a separate verdict on each of the six projects at issue in Count II, awarding a total of $21,518,097.00. App. C at 25a-28a. The District Court entered final amended judgment on Count II, based on the jury verdict, on July 6, 1998. App. B at 16a-24a. GM filed post-trial motions which were denied by the District Court. GM then appealed to the U.S. Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. § 1291, from the judgment entered on the jury verdict, which included a statement of finality pursuant to Rule 54, Fed.R.Civ.P.

On August 13, 1999, the U.S. Court of Appeals for the Eighth Circuit reversed the judgment of the District Court, holding that Michigan law would not expand the abandonment doctrine to contracts with change-order clauses, and further finding that even if the abandonment doctrine were applicable, the evidence adduced at trial was insufficient

to support application of the doctrine. The case was remanded to the District Court, with instructions to enter judgment for GM on Count II. App. A at 15a. Petitioner herein filed a Petition for Rehearing and for Rehearing en banc on August 26, 1999, which the U.S. Court of Appeals for the Eighth Circuit denied on September 21, 1999, with an amended order of denial issuing on September 23, 1999. App. D at 29a-30a.

ARGUMENT FOR GRANTING WRIT

Respondent, GM, regularly enters into contracts for construction services at its various plants located throughout the United States. Petitioner, RMT, is one of many such contractors who have entered into these contracts with GM. The contracts include standard form language, which GM contends allows it to substantially alter the original contracts and increase the work of the contractor, with the result that GM may refuse to pay full compensation and force the contractor to acquiesce. Because of GM's use of these contracts at plants located throughout the United States in projects involving multiple contractors with contract values in the millions of dollars, the questions presented in this case are of substantial importance beyond the dispute of the parties herein, and have a direct effect on interstate commerce.

The opinion of the United States Court of Appeals for the Eighth Circuit has either overlooked or misapprehended Michigan law which allows the theory of contract abandonment in situations where the ability to make changes has been agreed to by the parties and where evidence of excessive changes with significant detriment to the contractor is shown. The record in the District Court was fully developed with detailed information about GM's conduct on

all six projects from which the jury could infer GM's abandonment. Such evidence included proof of engineering delays, practical difficulties attributable to GM, repeated failures to make progress payments, repeated abuse of contract requirements and procedures, and change-orders that were excessive in number, in magnitude, and in their cumulative detrimental effect to RMT. In addition, there were admissions of GM's own supervisory staff at the Doraville, Georgia plant from which the jury could infer a pattern or course of conduct showing that GM intended abandonment as a natural result of its conduct. Petitioner was forced, by use of an economic hammer, to acquiesce to GM's abandonment, not only to its detriment but to its actual destruction.

Petitioner recognizes that the Supreme Court rarely grants petitions for certiorari solely to review what purports to be application of state law. However, precedent exists for this Court to do so. See, Leavitt v. Jane L., 518 U.S. 137, 144-145 (1996); Steele v. General Mills, Inc., 329 U.S. 433, 438, 440-441 (1947); Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 306 U.S. 103, 107 (1939).[3] The general presumption that a circuit court correctly decided a question of state law is inapplicable where such court's state law ruling is plainly wrong. Leavitt v. Jane L., 518 U.S. 137, 145 (1996). Only in exceptional cases with importance beyond the parties' particular dispute will the Supreme Court correct a federal court's misapplications of state law. D.L. Thomas v.

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[3] Petitioner also recognizes that this case does not fall within the three general reasons for granting Certiorari as stated in Rule 10, Rules of the Supreme Court. However, by the language of Rule 10, those reasons are "neither controlling nor fully measuring" the discretion of this Court to consider questions presented from the Courts below.

American Home Products, Inc., 519 U.S. 913, 117 S.Ct. 282, 284 (1996) (Rehnquist, J. dissenting).

This is one of those exceptional cases. A jury determined that Petitioner suffered damages in excess of $22 million as a result of GM's abandonment of its contractual obligations, a practice it is now free to follow wherever in the nation it does business as a result of the reversal of the judgment by the Court of Appeals. This case goes to the fundamental manner in which one of the largest corporations in the world does business and whether such a company can unilaterally dictate to its contractors how and when they will work, and whether or not they will be paid, irrespective of the scope and terms of the original agreements and irrespective of the harm which such practices cause. It is an appropriate case for this Court to exercise its discretion and grant Certiorari.

Argument 1

Michigan law permits the application of the abandonment doctrine without regard to change-order clauses.

The Court of Appeals reversed the judgment of the District Court in favor of Petitioner, finding that the Michigan abandonment cases cited by Petitioner did not include change-order clauses. The Court found this distinction to be fatal to the existence of an abandonment theory, unless Michigan law were to be expanded. The Court refused to make such an expansion. App. A at 9a-10a.

This ruling implies that Michigan courts would view a change-order provision as sufficient to deny the equitable remedy of implied abandonment. But courts in fact have uniformly refused to read change-order clauses to defeat

implied covenants of fair dealing or to permit a contractee to impose a substantially different contract on its contractors. There is no reason to believe that Michigan would permit a change-order clause to obliterate an equitable remedy well recognized in its law.

In fact, the Michigan case of Dault v. Schulte, 187 N.W.2d 914 (Mich. App. 1971) (App. E at 31a-36a) supports Petitioner's position. In Dault, the plaintiff and defendant entered into a written construction contract for $38,564.00. The parties agreed to certain changes in the work (albeit orally and, apparently, not pursuant to a written change-order clause) bringing the undisputed contract price to $43,000.00. The plaintiff asserted that the defendant failed to pay for an additional $5,394.00 of directed changes. The appellate court found that there existed a written contract with agreed changes but that the unagreed changes made by the defendant, together with variations in the mode and amount of payment, created a submissible case of abandonment for the jury.

The issue is whether the unagreed changes and payment issues supported abandonment. The existence of the agreed changes, with or without the presence of a change-order clause, was irrelevant. The Dault case recognizes the legal maxim that contracts may be modified by the parties but not unilaterally by the contractee and beyond the reasonable expectations of the contractor. The presence of a change-order clause, which only validates this maxim contractually, does not change the underlying law.

There is a strong federal interest in application of this equitable remedy to modern construction contract actions, regardless of the existence of change clauses. Reasonable change-orders are a fact of life in the modern construction industry. Such change-order clauses have become ubiquitous

in construction contracts, and they are meant to be time, cost, and litigation savers for the benefit of both contracting parties, not just the contractee. Construing change-order clauses to preclude equitable remedies would benefit neither contractees who act in good faith, nor contractors, who benefit from the practicality of such clauses.

Courts have not hesitated to maintain the balance between the flexibility permitted by such clauses and the invitation for contractee abuse such clauses appear to present. Where excessive changes are coupled with other problems, or where excessive changes are ordered to the substantial detriment of a contractor, implied abandonment is an accepted remedy. C. Norman Peterson Co. v. CCA, 172 Cal. App.3d 628, 639-640 (1985) and Schwartz v. Shelby Construction Co., 338 S.W.2d 781, 788-792 (Mo. 1960). No case cited by the Court of Appeals or the parties holds to the contrary. Nothing in Michigan law has been presented to suggest that its courts would hesitate to strike the same balance. Respondent contend that Michigan courts would find that the mere presence of a change-order clause in a contract is sufficient to preclude a well recognized remedy such as abandonment. By reversing the District Court's judgment, the Court of Appeals created a rule that gives, by law, to the contractee a blank check over the contractor's bank account which the contractee may fill in an amount at his whim. Giving such power to a dominant corporate entity such as GM creates an enormous effect on interstate commerce. Therefore, this question is of exceptional importance beyond the dispute of the parties, and there is a strong federal interest in applying the abandonment doctrine to contracts with change-order clauses.

Argument 2

RMT made a submissible case under Michigan law.

As a second part of its ruling, the Court of Appeals for the Eighth Circuit reversed the trial court's denial of GM's motion for judgment as a matter of law, finding insufficient evidence from which a reasonable juror could decide that GM intended to abandon its original contract with RMT.

Under Michigan law, an intent to abandon can be found in at least two ways: (a) from ordering extra or changed work which results in significant detriment to the contractor, or (b) from excessive changes coupled with other tactics, including delayed payment or abuse of other contract provisions. Dault v. Schulte, supra. See also Fenner v. Bolema Construction Co., 47 N.W.2d 662, 664 (Mich. 1951), where the plaintiff experienced job difficulties, and job delays, and where methods of construction were abandoned, more materials and equipment were required, and different work was performed with different methods of payment than originally agreed, and the court found this evidence sufficient to support the plaintiff's case for the jury on the question of whether an abandonment had occurred.

(a) There was sufficient evidence of excessive change-orders with corresponding detriment to the contractor.

The Court of Appeals rejected RMT's evidence that there were excessive change-orders to RMT's detriment. The Court found that changes were contemplated from the beginning, that field orders were to be expected, and that RMT requested additional work. App. A at 9a-10a. RMT

does not dispute those findings. But RMT submits that they only provided a starting point from which to decide whether there was a *prima facie* case that the changes demanded by GM were in fact excessive, in light of the expectations of the parties when the contracts were executed.

RMT presented evidence in the form of expert opinion testimony from Mike Callahan as to the level at which GM's change-orders ceased being reasonable and contemplated and instead become excessive. He set the industry standard for that bar at 10%. The evidence cited by the Court of Appeals indicated that RMT's increases ranged from 16.7% to 23.3% (if the Doraville evidence of 106.8% is omitted). App. A at 4a. Lawsuits over construction contracts such as this one often will involve large contractees using virtually identical contracts with numerous contractors across the country. There is a strong federal interest in establishing some consistency in these cases. It should not be error when a District Court uses uncontested expert testimony as to accepted industry standards, in order to set ordinary thresholds for jury questions in such cases. Callahan's opinion was not controverted by GM. Indeed, Michigan law has accepted levels of approximately 12 1/2% in such cases as submissible evidence of excess. (See Dault v. Schulte, 187 N.W.2d at 915, where $5,394.00 of unagreed changes was compared to $43,000.00 of agreed contract price). The trial court did not err in accepting Callahan's uncontested expert opinion to establish a threshold percentage level for allegations of excessive changes, and RMT submitted evidence well over that threshold.

Evidence of excessive change-orders without resulting significant detriment to the contractor will not create a jury question of intent to abandon a contract. In this case, Callahan established that the timing of GM's change-orders

harmed RMT, and he pointed to the effect which the use of verbal orders instead of written orders had on RMT.

In addition to abuse of the change-order process, RMT adduced evidence that GM consistently made work schedule changes and design changes, and evidence concerning the resulting negative effect which this conduct had on RMT, as well as evidence of delayed engineering.

The Court of Appeals failed to acknowledge such evidence. Instead, that Court focused on evidence that such contracts are inherently risky and always involve some changes. The Court pointed out that RMT expected to get higher margins of profit on field order work. The Court then suggested that "RMT may have actually benefited from GM's use of field orders." App. A at 11a. There was absolutely no evidence that RMT benefited from GM's use of field orders. Neither the district court nor a reviewing court was free to disregard evidence linking RMT's financial downfall to GM's excessive change-orders. Nor is a court free to speculate about what might have happened in the absence of any facts to support that speculation as reality.

Evidence of excessive change-orders combined with evidence of resulting significant detriment to the contractor are alone sufficient under Michigan law to present a jury question on a contractee's intent to abandon. Dault v. Schulte, supra; Brackney & Son v. Ryniewicz, 78 N.W.2d 127, 130-131 (Mich. 1956). In this case, the district court did not err in finding a triable issue as to whether GM had issued excessive change-orders to the detriment of RMT. Such a finding was reasonable, based on uncontroverted expert testimony as to industry standards as to what constitutes excessive changes and based on repeated evidence of the witnesses concerning the harm that flowed to RMT from

GM's excessive change-orders. Under Michigan law, the combination of evidence of excess and evidence of harm is sufficient to create a jury question of intent to abandon, regardless of the presence of the change-order clause.

(b) RMT presented sufficient evidence for a jury question as to whether GM abused the emergency field order provisions and unreasonably delayed payment to RMT's detriment.

The Court of Appeals found RMT's evidence insufficient to reach a jury on whether the emergency field order procedures were abused or whether delays in payment were evidence from which a jury could decide GM's intent to abandon the contract. App. at 10-11. In explanation of its findings the Court cited Mark Murray's testimony that the 42 change-orders on the Bowling Green project was not an unusually high number. App. A at 12a. However, excessive change-orders and the abuse of procedures for implementing change-orders are not the same issue. Murray's testimony does not go to the question of whether the procedures used for demanding those changes were abused.

The Court of Appeals failed to address the evidence presented by RMT that GM used emergency field orders routinely, rather than in emergent situations. Phil Disch, a high level GM employee, explained at trial through deposition that routine use of emergency field orders to accomplish work was improper and that such procedure was reserved for true emergencies. Mr. Taylor testified throughout the record as to GM's routine use of emergency field orders for virtually all the work on the *quantum meruit* jobs.

Instead, the Court of Appeals adopted GM's view of the supposed benefit to RMT of having sole access to emergency field order work instead of having to bid on normal change-orders specified by bulletins. In doing so, the Court failed to recognize RMT's evidence that the field order procedure, if abused, would naturally work to a contractor's detriment and GM's benefit.

The contract, as the Court of Appeals found in defining the term "emergency," severely limited GM's right to invoke the emergency procedures clause. RMT's evidence showed that GM in fact used the emergency field order procedures to place RMT in an economic box that was both unexpected and uncontemplated in the contract. The contractor was required to perform emergency field order work on demand or lose the contract. There was no opportunity to determine whether RMT was ready or able to do the added work or even what it would be paid for such work. It was not error for the district court to find that RMT had presented sufficient evidence of GM's misuse of field order procedures to present a jury question of GM's intent to abandon its original contract.

Finally, the Court of Appeals found that, except for the Doraville project, there was no evidence that GM unreasonably delayed payment. The Court misapprehended and failed to consider RMT's evidence regarding the time, on average, within which change-order work was completed, and the time, on average, it took to be paid from the time the work started.

The Court adopted GM's argument that it was only enforcing its contractual rights to withhold payment, and that RMT's problems were due to its own inability to comply with the contracts, including its failure to provide lien waivers.

RMT presented evidence that its failure to pay subcontractors on time for work done under emergency field orders was the direct result of GM's failure to negotiate in good faith on payment for that work.

Although a jury might well have found GM's evidence persuasive enough to render a defendant's verdict, the Court of Appeals should not have weighed conflicting evidence in reversing the trial court at a threshold stage. Whether or not RMT's evidence of how it was reduced to bankruptcy is more credible than GM's version, there was sufficient evidence for a jury to consider both sides. The District Court did not err in sending these issues to the jury.

CONCLUSION

The Court of Appeals' reversal of a $22,000,000 jury verdict in favor of Petitioners was based on a misapplication of the doctrine of abandonment under Michigan law. Michigan law permits the theory of contract abandonment in situations such as this. The parties had agreed to the methods of making changes, but GM did not follow those methods. Petitioner introduced clear evidence of excessive changes with significant detriment to the contractor and fully developed the record in the District Court with detailed information about GM's conduct from which the jury could infer GM's abandonment.

GM is a major purchaser of construction services for its operations that are located throughout the United States. Its use of standard form contracts and its ability to unilaterally dictate how those contracts need to be applied, regardless of their terms, has far-reaching implications beyond the dispute between RMT and GM, and has potential ramifications on interstate commerce. The opinion of the Eighth Circuit will

permit these practices to continue unless contractors such as RMT are allowed to use the tool which the Michigan courts have recognized as a means to fight such practices - the doctrine of contract abandonment. Supreme Court intervention is both necessary and critical to prevent huge national corporations such as GM from using their superior economic power to eviscerate the terms of agreements entered into in good faith with their contractors.

Petitioner would respectfully suggest that this is an appropriate case for this Court, in its discretion, to grant Certiorari and provide guidance to all contractors who choose to deal with GM and others similarly situated.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed August 13, 1999]

No. 98-3626

R. M. Taylor. Inc., a Missouri corporation,
Appellee,

v.

General Motors Corporation, a Delaware corporation.
Appellant.

Submitted: April 21, 1999

Appeal from the United States District Court
for the Western District of Missouri

Before RICHARD S. ARNOLD and WOLLMAN,[1] Circuit Judges, and WOLLE,[2] District Judge.

WOLLMAN, Chief Judge.

General Motors Corp. (GM) appeals from the denial of its motion for judgment as a matter of law following a jury verdict in favor of R.M. Taylor, Inc. (RMT), which found that GM had impliedly abandoned construction contracts with RMT. We reverse and remand.

I.

RMT entered into contracts to design and construct conveyor systems at several GM plants. Each contract contained the following provision:

> The Owner (GM) shall have the right at any time to require alterations in, additions to and deductions from the work shown on the Drawings or described in the Specification without rendering void the Contract. . . . All changes shall be described in an Emergency Field Order or Bulletin issued by the Owner. Receipt of Drawings or verbal orders shall not constitute authority to proceed with changes in the work. An Emergency Field Order

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[1] Roger L. Wollman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 24, 1999.

[2] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa, sitting by designation.

> authorizes the Contractor to proceed immediately with the work described therein with the price to be determined. A BULLETIN IS A REQUEST FOR QUOTATION. The Contractor shall not proceed with the work described in the bulletin until the work is authorized by [a]n Emergency Field Order, [a] Contract Supplement, or [a] Contract Change Order.

GM Construction General Conditions (GM 1638) § 46.1, Appellant's Appx. at 204. The contracts also contained detailed provisions on the pricing of emergency field order work. See id. §§ 46.2-46.4, Appellant's Appx. at 204-08. Because RMT placed the bids based on general drawings rather than customized designs for each plant, the provisions regarding changes in the work were particularly important.

To receive periodic payments under the contracts. RMT was required to inform GM of the status of its payments to subcontractors. See id. § 44.12, Appellant's Appx. at 203. This requirement was included because the subcontractors could file mechanic's liens against GM's property if they were not paid by RMT. The contracts allowed GM to withhold payments from RMT and make payments directly to the subcontractors in the event RMT did not submit lien waivers showing that the subcontractors had been paid. Id.

During the construction of the conveyor systems, GM ordered many changes from the general drawings originally submitted by RMT. These changes were implemented through bulletins and emergency field orders. The number of

changes ordered and overall increased costs of the projects were as follows:

Location	Original Price	Changes	Final Price	Increase
Arlington, TX	$ 5,100,000	15	$ 5,949,173	16.7%
Bowling Green, KY	$14,265,815	42	$16,935,183	18.7%
Doraville, GA	$11,754,000	64	$24,308,493	106.8%
Pontiac East, MI	$ 4,500,000	44	$5,540,506	23.1%
Shreveport, LA	$ 2,710,089	5	$3,200,498	18.1%
Wentzville, MO	$7,787,845	3	$9,600,000	23.3%

See Trial Tr. at 541 (Wentzville final price), 1246-50 (Arlington original price, changes, and final price; Bowling Green original price, changes, and final price; Doraville original price, changes, and final price; Pontiac East original price, changes, and final price; Shreveport final price; Wentzville changes), 1578 (Shreveport original price), 2372 (Shreveport changes); Def. Ex. 958A (Wentzville original price).

Because bulletins were simply requests for quotations, RMT did not proceed with additional work described in bulletins unless it chose to submit a quotation and was awarded the additional work at that rate by GM. For emergency field orders, however, the contracts required RMT to perform the additional work immediately and then negotiate

with GM to obtain payment. The negotiation process required RMT to provide GM's local contract manager a quote for the emergency field order work. The contract manager would then submit the quote to GM's plant engineer and overall project engineer for approval. GM could accept the quote or reject it and propose a different amount for payment. If GM rejected the quote, the contract manager and RMT's project manager would meet to discuss the discrepancy and agree on a price, which would be submitted to GM's plant engineer and overall project engineer for approval. This initial quotation process usually lasted between four and ten days.

After the parties agreed on a quote, RMT would submit a formal invoice, a sworn statement detailing the amounts to be paid to subcontractors, and the lien waivers to GM's contract manager. This documentation would then be submitted to the GM engineers for approval. It would then be forwarded to GM's accounting department, whereupon the first official "receipt" of the invoice would be generated. The documentation would then be returned to the contract manager for submission to the local GM finance department, resulting in the issuance of a second receipt, which would be sent to the GM disbursement department for payment. This process usually lasted between two and four weeks from the time the parties agreed on a quote.

If the invoice was for more than $100,000, it would pass through the audit department. If that department approved the invoice, the contract would be formally amended and RMT would be paid. In such a case, the total processing time for the invoice was three to six weeks from the time RMT provided GM's local contract manager with a quote for the emergency field order work. If the audit department

found a problem with the invoice or its supporting documentation, however, it would return the materials to RMT for resubmission. In such a case, the total processing time might extend to more than ten weeks. Once the invoice was formally approved and the contract amended, GM had until the 25th of the following month to pay RMT.

This negotiation process, as opposed to the bidding process used for bulletins, required RMT to cover the additional expenses resulting from emergency field orders. The longer GM negotiated the price of the field orders, the longer RMT was forced to cover these expenses. As a result of these delays in payment, RMT was unable to pay its subcontractors, and it ultimately brought suit against GM, alleging excessive changes in the contracts and excessive delays in payment.

Count I of RMT's complaint alleged that GM's actions constituted a breach of the contracts; Count II alleged that GM impliedly abandoned the contracts. Although the jury heard evidence on both counts, the district court severed Count I "for separate resolution" and submitted only Count II to the jury. The jury found implied abandonment and awarded RMT quantum meruit damages of $21.5 million. The court entered judgment on the verdict and denied GM's renewed motion for judgment as a matter of law.

II.

We review the denial of a motion for judgment as a matter of law de novo. See Arthaud v. Mutual of Omaha Ins. Co., 170 F.3d 860, 862 (8th Cir. 1999). GM is entitled to judgment as a matter of law "only if there was insufficient

evidence to support the jury verdict." Id. We view all facts and resolve all conflicts in favor of RMT in making this determination, giving it the benefit of all reasonable inferences. See Varner v. National Super Markets, Inc., 94 F.3d 1209, 1212 (8th Cir. 1996). If the evidence is such that no reasonable juror could have inferred an intent to abandon the contracts, however, GM is entitled to judgment as a matter of law and we must reverse. See id.

Because our jurisdiction is premised on diversity, we apply state substantive law to RMT's claim. See Zunamon v. Brown, 418 F.2d 883, 889 (8th Cir. 1969) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). The district court correctly concluded that Michigan law controls under the choice-of-law provision agreed to by the parties in the contracts. See Moses v. Union Pac. R.R., 64 F.3d 413,418 (8th Cir. 1995) (holding that district courts must apply the choice-of-law rules of forum states): Consolidated Fin. Inv., Inc. v. Manion, 948 S.W.2d 222, 224 (Mo. Ct. App. 1997) (stating that Missouri courts defer to parties' contractual choice-of-law provisions).

"The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted." Dault v. Schulte, 187 N.W.2d 914, 915 (Mich. Ct. App. 1971) (quoting 17 Am. Jur. 2d Contracts § 484 (now 17A Am. Jur. 2d Contracts § 543 (1991))). A party displays an intent to abandon if it "positively and absolutely refuses to perform the conditions of the contract, such as a failure to make payments due, accompanied by other circumstances, or where by [its] conduct [it] clearly shows an intention to abandon the

contract." Collins v. Collins, 83 N.W.2d 213, 216-17 (Mich. 1957) (internal quotations omitted). Abandonment must be mutual, however; if one party continues to perform under the contract after the other party exhibits an intent to abandon, there has been no abandonment. See 17A Am. Jur. 2d Contracts § 543; see also S. S. Silberblatt, Inc. v. Seaboard Sur. Co., 417 F.2d 1043, 1054-55 (8th Cir. 1969) (holding that abandonment requires mutual consent of the parties); Dault, 187 N.W.2d at 915-16 (finding that the parties abandoned the contract because one party ordered work not contemplated in the contract and the other party "acquiesced" by performing the non-contractual work rather than performing under the contract).

In support of the verdict, RMT argues that GM exhibited an intent to abandon the contracts by ordering too many changes, using emergency field orders when it should have used bulletins, and abusing the negotiation process to intentionally delay payment of field orders and leverage RMT into accepting less for its work. We address each argument in turn.

A.

RMT contends that an intent to abandon the contracts can be inferred from GM's excessive and untimely use of emergency field orders. According to RMT, it "was forced, by use of an economic hammer, to acquiesce to GM's abandonment, not only to its detriment but to its actual destruction." Appellee's Br. at 16. At trial, RMT's construction consultant Michael Callahan testified that change orders that raise project costs by more than ten percent are typically considered unreasonable in the construction industry.

See Trial Tr. at 1253-56. In addition, Callahan stated that the timing of GM's field orders harmed RMT, See id. at 1257.

RMT failed, however, to demonstrate that GM's use of field orders evinced an intent to abandon the contracts. To the contrary, because the contracts included change-order clauses, GM acted in conformance with the terms of the contracts in issuing field orders. The Michigan cases cited by RMT that find implied abandonment are distinguishable because they did not involve contracts that included such clauses. See Dault, 187 N.W.2d at 915; H. O. Brackney & Son v. Ryniewicz, 78 N.W.2d 127, 130 (Mich. 1956); Fenner v. Bolema Constr. Co., 47 N.W.2d 662, 664 (Mich. 1951).

Nonetheless, RMT maintains that GM abused the change-order provisions by ordering changes outside the scope of the original contracts. RMT relies on cases from jurisdictions that have expanded the abandonment doctrine to cases involving contracts containing change-order clauses. See Peter Kiewit Sons' Co. v. Summit Constr. Co., 422 F.2d 242, 254-55 (8th Cir. 1969) (applying South Dakota law); C. Norman Peterson Co. v. Container Corp. of Am., 218 Cal. Rptr. 592, 598 (Cal. Ct. App. 1985); Bogert Constr. Co. v. Lakebrink, 404 S.W.2d 779, 782 (Mo. Ct. App. 1966); Schwartz v. Shelby Constr. Co, 338 S.W.2d 781, 788-91 (Mo. 1960). The abandonment doctrine has not been so expanded under Michigan law, and we will not expand an equitable state law doctrine such as implied abandonment beyond the clear dictates of state case law. See, e.g., Agrigenetics, Inc. v. Rose, 62 F.3d 268, 270-71 (8th Cir. 1995) (refusing to apply an equitable doctrine in a diversity, case because the state courts had not recognized it); McIlheran v. Lincoln Nat'l Life Ins. Co., 31 F.3d 709, 711 (8th Cir.

1994) (same); cf. Adams Pub. Sch. Dist. v. Asbestos Corp., 7 F.3d 717, 719 (8th Cir. 1993) (applying an equitable doctrine even though the state courts had not recognized it because the federal interest was "sufficiently strong").

Even if it were held that excessive or untimely change orders could support a finding of implied abandonment under Michigan law, the evidence does not support such a finding in this case. The cases relied on by RMT involved far more egregious facts. In Schwartz, changes were ordered nearly every day, including major structural changes, and only once was a change order issued as required by the contract. See 338 S.W.2d at 788-89. In Bogert, there was no binding contract from the beginning because the parties left material plans and specifications open for negotiation. See 404 S.W.2d at 781. Furthermore, the owner made extensive and frequent changes to the plans without following contractual change-order procedures. See id. at 780-81. In C. Norman Peterson "hundreds of changes" were ordered without following contractual change-order procedures. See 218 Cal. Rptr. at 599.

Here, changes were contemplated from the beginning of the projects because RMT placed the bids based on general rather than customized drawings. Further, GM consistently followed the contractual procedure for ordering changes. Accordingly, the changes did not go beyond the scope of the contracts. See Uhle v. Tarlton Corp., 938 S.W.2d 594, 597-99 (Mo. Ct. App. 1997) (finding no implied abandonment as a matter of law because the contract contemplated changes and the parties followed contractual change-order procedures); Oliver L. Taetz, Inc. v. Groff, 253 S.W.2d 824, 828 (Mo. 1953) (same).

In addition, RMT did not acquiesce in any attempt to abandon because it believed the field order work was part of the contracts. Patrick Perry, RMT's vice president of sales and estimating, acknowledged that accepting bids based on general drawings was "inherently risky" because changes were always required in order to customize the conveyor systems for each plant. See Trial Tr. at 1198-1200. Arthur Bond, RMT's vice president of system integration on the Shreveport project, testified that "typically, in the course of a project, there are extras." Id. at 2095. Bond also stated that RMT knew about the need for changes and specifically requested "any and all additional work that might be available." Id. at 2120. According to Bond, RMT placed attractive bids by using low profit margins and then recouped profits by doing extra field order work that allowed for higher margins. See id. at 2095-97; see also GM 1638 § 46.2, Appellant's Appx. at 204 (allowing overhead and profit in the payment of field orders). Unlike bulletins, which were competitively bid, RMT was guaranteed to receive the emergency field order work. Accordingly, RMT may have actually benefitted from GM's use of field orders.

B.

Nor was there sufficient evidence to support RMT's theory that GM exhibited an intent to abandon the contracts by using emergency field orders in non-emergency situations. An "emergency" is "an unforeseen combination of circumstances or the resulting state that calls for immediate action," "a pressing need," or "a usually distressing event or condition that can often be anticipated or prepared for but seldom exactly foreseen." Webster's Third New Int'l Dictionary (1986). RMT does not cite a different definition

that is customary in the construction industry. Nor does the evidence suggest that this definition was not met when GM issued emergency field orders in this case. To the contrary, Mark Murray, RMT's vice president of sales and engineering on the Bowling Green project, testified that the forty-two change orders on that project was not an unusually high number, "[e]specially since we were the only conveyor contractor on the project." Trial Tr. at 2277-78.

C.

RMT also claims that GM's delay in paying field orders constituted an implied abandonment. It introduced evidence that John Gilpin, GM's project director at Doraville, believed that there were excessive payment delays for field orders on that project. See id. at 399-406. GM argues that the district court erred by admitting the Doraville evidence to show that it intended to abandon the contracts.

Because the parties had settled the Doraville claim prior to trial, the court granted GM summary judgment on that claim. See Order of Feb. 13, 1998, at 11. It found that three small claims relating to the Doraville project had not been settled, however, and preserved those claims for trial. See id. (discussing field orders 17A, 53, and 54). The court proceeded to admit all of RMT's Doraville evidence at trial on the ground that it showed a pattern of conduct under Fed. R. Evid. 406. See Pre-Trial Conf. Tr. at 37-38 (RMT's counsel arguing for admission of the evidence under Rule 406 because it showed a habit or custom); Trial Tr. at 3-4 (court reiterating at the start of trial that all Doraville evidence would be admitted to show a routine practice by GM). We conclude that the court erred in admitting this evidence, for

the record shows that the three claims related to Doraville had all been settled and formally added to the contract more than one year prior to trial. See Trial Tr. at 774, 1910; see also Def. Ex. 4330 (depicting the settlement amounts and contract revision numbers for field orders 17A, 53, and 54).

Even if it were held that the Doraville evidence was properly before the jury, there would nonetheless be insufficient evidence of abandonment because RMT failed to demonstrate that GM acted in a manner inconsistent with the terms of the contracts in delaying payment on the field orders. The contracts did not require GM to pay for emergency field order work immediately or within any specific amount of time. Rather, they simply required GM to pay invoices by the 25th of the month following the month in which they were formally approved. See GM 1638 § 44.14, Appellant's Appx. at 203. Scott Simkins, RMT's accounts receivable manager, testified that GM consistently abided by these payment terms. See Trial Tr. at 946-47. The only basis for RMT's claim, then, is that the lengthy negotiation process for approving invoices was so excessive as to constitute an abandonment of the contracts.

We find this argument unpersuasive. RMT acknowledged that some of the delay in approving invoices could have been due to its own delay in submitting quotes to GM. See id. at 897-98. In addition, Simkins stated that the jury exhibits depicting the time required for payment of field orders failed to account for the thirty to sixty day "normal time lag" for approving invoices. Id. at 895.

Most importantly, the primary cause of the delay in payment was RMT's own failure to submit lien waivers from

subcontractors. Simkins testified that on at least three occasions RMT violated the contracts by failing to use the funds that GM had provided to pay subcontractors. See id. at 944-45. As soon as RMT stopped paying subcontractors, it was unable to send GM invoices because "there were no waivers of lien." Id. at 945. Under GM's invoice-approval process, invoices that were not accompanied by lien waivers were returned to RMT. Although this greatly increased the time required for payment, the invoice-return policy was explicitly provided for in the contracts, and RMT understood that lien waivers were required for payment under the contracts and in the construction industry generally. See id. at 885-86. Thus, GM was enforcing, rather than abandoning, the terms of the contracts in withholding payments when RMT failed to provide lien waivers.

Under Michigan law, courts are not to read out of contracts clauses that have been freely negotiated and whose meaning is abundantly clear. See Whitaker v. Citizens Ins. Co. of Am., 476 N.W.2d 161, 163 (Mich. Ct. App. 1991); General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038, 1041 (6th Cir. 1990) (applying Michigan law). RMT was experienced in contract negotiation and had entered into many contracts that contained change-order clauses. It could have avoided what it later characterized as resulting unfairness by negotiating a different method of payment on field orders. For example, RMT could have insisted on a provision requiring GM to pay for "impact costs" caused by emergency field orders. See Uhle, 938 S.W.2d at 599 (stating that contractors can avoid inequity by including contractual provisions that cover additional expenses caused by emergency field orders).

On the record before us, no reasonable juror could have found that GM intended to abandon the contracts. Accordingly, GM was entitled to judgment as a matter of law on Count II. The judgment is reversed, and the case is remanded for further proceedings consistent with the views set forth in this opinion.[3]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[3] In light of our holding, GM's motion to strike portions of RMT's addendum and brief is denied as moot.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

[Filed July 6, 1998]

No. 97-0454-CV-W-BD-SOW

R. M. TAYLOR, INCORPORATED,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

AMENDED JUDGMENT ON JURY VERDICT

This action came before this Court for trial by jury on February 17, 1998. Count II of plaintiff's Second Amended Complaint was tried to the jury, and Counts I and III were severed by the Court for separate resolution. On March 5, 1998, the jury returned a verdict in favor of R.M. Taylor on Count II of its Second Amended Complaint and against defendant General Motors Corporation in the amount of $21,518,097.00.

Before this Court are plaintiff's Motion for an Award of prejudgment Interest (doc. #251), defendant's Opposition, plaintiff's Amended Reply, defendant's Response, defendant's Supplemental Response, plaintiff's Supplemental Response, defendant's Reply filed May 26, 1998, plaintiff's letter dated May 8, 1998, defendant's letter dated May 12, 1998, plaintiff's letter dated May 13, 1998, defendant's letter dated May 14, 1998, plaintiff' letter dated May 15, 1998, and defendant's letter dated May 20, 1998.

"State law governs issues of prejudgment interest." Walton General Contractors v. Chicago Formina, 111 F.3d 1376, 1383 (8th Cir. 1997). To determine which state law to apply, this Court applies the choice-of-law rules of Missouri, the forum state. Moses v. Union Pacific R.R., 64 F.3d 413, 418 (8th Cir. 1995).

Defendant asserts that, based on the choice-of-law provision in the purchase orders and this Court's previous ruling, Michigan law applies. Plaintiff argues that because the jury found that the contracts were abandoned, the choice-of-law provision no longer applies and prejudgment interest should be awarded according to Missouri law.

In contract actions, Missouri has adopted the Restatement (Second) of Conflict of Laws (1971). Intern. Minerals & Chem Avon Products, 889 S.W.2d 111, 121 (Mo. App. 1994). This Court previously found that the parties' choice-of-law provision applied to determine whether GM breached the purchase orders in Count II to the extent it resulted in abandonment of those contracts.

The issue of prejudgment interest is determined by applying the rules of §§ 187-188. Restatement (Second) of Conflict of Laws § 207, comment e (1971); Intern. Minerals & Chem., 889 S.W.2d at 121 ("The Restatement provides that the measure of damages for a breach of contract – including specifically the issue of interest – is governed by the parties' choice of law."). Section 187 is the guideline for determining whether there has been an effective choice of law by the parties. Section 187 states, in part, that the choice-of-law provision will be applied "if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement (Second) of Conflict of Laws Section 187 (1971). Applying § 187 and § 207 to the issue of prejudgment interest and based on Intern. Minerals & Chem., *supra*, this Court finds that prejudgment interest is governed by the parties' choice-of-law provision. Accordingly, prejudgment interest shall be awarded according to Michigan law.

Even assuming that because the jury found that the contracts were abandoned, the choice-of-law provision in the purchase orders is no longer effective under § 187, this Court finds that Michigan law should still be applied pursuant to § 188. Section 188 states in part:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in Section 6.

(2) In the absence of an effective choice of law by the parties (see Section 187), the contacts to be taken into account in applying the principles in Section 6 to determine the law applicable to an issue include:

(a) the place of contracting,
(b) the place of negotiation of the contract.
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws Section 188 (1971).

Applying factors (a)-(e), the state with the predominant contacts, with respect no this particular issue, is Michigan. The place of contracting was Michigan, where the bids were submitted by RMT and accepted by GM. The place where the parties negotiated was Michigan or the state where each plant was located and where RMT was involved in pre-award and post-award meetings. The place of performance and the location of the subject matter of the contract would vary for each of the purchase orders but would include Michigan, Missouri, Louisiana, Kansas, Kentucky, Georgia and Texas.

GM is a Delaware corporation with its principal place of business in Michigan and R.M. Taylor is a Missouri corporation with its principal place of business in Missouri. Accordingly, this Court finds that prejudgment interest is governed by Michigan law because Michigan is the state meeting the most significant relationship test.

Under Michigan law, defendant shall pay plaintiff interest at the statutory rate as set forth in Mich. Comp. Laws Ann. § 600.6013 (6) . See Michigan Dept. of Treasury v. Central Wayne Co. Sanitation Auth., 463 N.W.2d 120, 124 (Mich. Ct. App. 1990) (" [T]rial court's order was adequate in specifying the method used for computing the interest owed by defendant.") Even though the original complaint did not allege the theory upon which plaintiff ultimately recovered, interest is awardable from the date that a complaint was filed against defendant, which was April 11, 1997. Phinnev v. Verbrugge, 564 N.W.2d 532, 549 (Mich. Ct. App. 1997) .

Interest will be calculated by the bankruptcy court after the appeals are final. After the appeals are final, the bankruptcy court will determine the amount of credits and setoffs defendant is entitled to on Count II. Interest will only be calculated on the amount determined by the bankruptcy court by taking the jury verdict of $21,518,097.00 minus the credits and setoffs the bankruptcy court determines are proper.

Accordingly, it is hereby

ORDERED that on the Count II claims of plaintiff R.M. Taylor Incorporated against defendant General Motors Corporation for abandonment of multiple contracts, as

submitted to the jury in the Instructions, judgment is entered in favor of R.M. Taylor Incorporated and against General Motors Corporation. It is further

ORDERED that plaintiff R.M. Taylor Incorporated be awarded damages in the amount of $21,518,097.00, as determined by the jury. It is further

ORDERED that, after the appeals are exhausted, the bankruptcy court will determine the amount of credits and setoffs defendant is entitled to on Count II. It is further

ORDERED that plaintiff's Motion for and Award of Prejudgment Interest (doc. #251) is granted. It is further

ORDERED that interest will be calculated by the bankruptcy court after the appeals are final. It is further

ORDERED that interest will only be calculated on the amount determined by the bankruptcy court by taking the jury verdict of $21,518,097.00 minus the credits and setoffs the bankruptcy court determines are proper. It is further

ORDERED that interest will be at the statutory rate as set forth in Mich. Comp. Laws Ann. § 600.6013 (6) from April 11, 1997, the date the original Complaint was filed, to the date of satisfaction of the judgment. It is further

ORDERED that because there is no just reason for delay, final judgment shall be entered on Count II.

/s/_____
SCOTT O. WRIGHT
Senior United States District Judge

July 6, 1998

District Court Amended Judgment - 7/6/98

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

[Filed July 6, 1998]

No. 97-0454-CV-W-SOW

R. M. TAYLOR, INCORPORATED, *Plaintiff*,	)
v.	)
GENERAL MOTORS CORPORATION, *Defendant.*	)

JUDGMENT IN A CIVIL CASE

[ ] Jury verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff R.M. Taylor Incorporated be awarded damages in the amount of $21,518,097.00, as determined by the jury. It is further

ORDERED that after the appeals are exhausted, the bankruptcy court will determine the amount of credits and setoffs defendant is entitled to on Count II. It if further

ORDERED that plaintiff's Motion for and Award of Prejudgment Interest (doc #251) is granted. It is further

ORDERED that interest will be calculated by the bankruptcy court after the appeals are final. It is further

ORDERED that interest will only be calculated on the amount determined by the bankruptcy court by taking the jury verdict of $21,518,097.00 minus the credits and setoffs the bankruptcy court determines are proper. It is further

ORDERED that interest will be at the statutory rate as set forth in Mich. Comp. Laws Ann § 600.6013 (6) from April 11, 1997, the date the original Complaint was filed, to the date of satisfaction of the judgment. It is further

ORDERED that because there is no just reason for delay, final judgment shall be entered on Count II.

Date: 7/6/98

R. F. CONNER
Clerk

/s/_____
(By) Deputy Clerk

APPENDIX C

[Filed March 5, 1998]

No. 97-0454-CV-N-SOW

VERDICT

Note: Complete this form by writing in the name required by your verdict.

Doraville

On the claim of plaintiff R.M. Taylor, Inc., against defendant General Motors Corporation on the Doraville project, we the jury, find in favor of:

R. M. Taylor, Inc.

Plaintiff R. M. Taylor, Inc. or Defendant General Motors

Note: Complete the following paragraph only if the above finding is in favor of plaintiff R.M. Taylor, Inc.

We, the jury, assess the damages of plaintiff R.M. Taylor, Inc. on the Doraville Project at $253,664 [stating the amount].

Arlington

On the claim of plaintiff R.M. Taylor, Inc., against defendant General Motors Corporation on the Arlington project, we the jury, find in favor of:

R. M. Taylor, Inc.

Plaintiff R. M. Taylor, Inc. or Defendant General Motors

Note: Complete the following paragraph only if the above finding is in favor of plaintiff R.M. Taylor, Inc.

We, the jury, assess the damages of plaintiff R.M. Taylor, Inc. on the Arlington Project at $2,754,599 [stating the amount].

Bowling Green

On the claim of plaintiff R.M. Taylor, Inc., against defendant General Motors Corporation on the Bowling Green project, we the jury, find in favor of:

R. M. Taylor, Inc.

Plaintiff R. M. Taylor, Inc. or Defendant General Motors

Note: Complete the following paragraph only if the above finding is in favor of plaintiff R.M. Taylor, Inc.

We, the jury, assess the damages of plaintiff R.M. Taylor, Inc. on the Bowling Green Project at $7,512,971 [stating the amount].

Shreveport

On the claim of plaintiff R.M. Taylor, Inc., against defendant General Motors Corporation on the Shreveport project, we the jury, find in favor of:

R. M. Taylor, Inc.

_____

Plaintiff R. M. Taylor, Inc. or Defendant General Motors

Note: Complete the following paragraph only if the above finding is in favor of plaintiff R.M. Taylor, Inc.

We, the jury, assess the damages of plaintiff R.M. Taylor, Inc. on the Shreveport Project at $1,337,275 [stating the amount].

Pontiac East

On the claim of plaintiff R.M. Taylor, Inc., against defendant General Motors Corporation on the Pontiac East project, we the jury, find in favor of:

R. M. Taylor, Inc.

_____

Plaintiff R. M. Taylor, Inc. or Defendant General Motors

Note: Complete the following paragraph only if the above finding is in favor of plaintiff R.M. Taylor, Inc.

We, the jury, assess the damages of plaintiff R.M. Taylor, Inc. on the Pontiac East Project at $3,556,944 [stating the amount].

Wentzville

On the claim of plaintiff R.M. Taylor, Inc., against defendant General Motors Corporation on the Wentzville project, we the jury, find in favor of:

R. M. Taylor, Inc.

_____

Plaintiff R. M. Taylor, Inc. or Defendant General Motors

Note: Complete the following paragraph only if the above finding is in favor of plaintiff R.M. Taylor, Inc.

We, the jury, assess the damages of plaintiff R.M. Taylor, Inc. on the Wentzville Project at $6,102,644 [stating the amount].

/s/_____

Jury Foreperson

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed September 23, 1999]

No. 98-3626WMKC

R. M. Taylor, Inc., a Missouri corporation, *Appellee,*	)
v.	)
General Motors Corporation, a Delaware corporation, *Appellant.*	)

Order Denying Petition for Rehearing and for Rehearing En Banc

AMENDED ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge McMillian and Judge Loken took no part in the consideration or decision of this case.

September 21, 1999

Order Entered Under Rule 27B(a):

/s/_____
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

187 N.W.2d 914
(Cite as: 31 Mich. App. 698, 187 N.W.2d 914)

Harold DAULT, Plaintiff-Appellee,
v.
Anastasia SCHULTE, Defendant-Appellant.

Docket No. 9391.

Court of Appeals of Michigan, Division No. 3.

March 25, 1971.

Released for Publication July 2, 1971.

Action by contractor against owner of tavern to recover a portion of his costs in constructing the tavern. The Circuit Court, Presque Isle County, Philip J. Glennie, J., entered judgment from which defendant appealed. The Court of Appeals, Holbrook, J., held that evidence, including testimony to effect that defendant owner visited job site nearly every working day and that defendant proceeded to change plans as contained in contract from time to time in accordance with her desires, supported finding that there had been an abandonment of the contract.

Affirmed.

Before FITZGERALD, P.J., and HOLBROOK and BRONSON, JJ.

HOLBROOK, Judge.

This an appeal as of right from a judgment, entered after a non-jury trial, for tho plaintiff in the amount of $3,123.95 for labor and materials.

In January 1968, plaintiff, a self-employed builder, entered into an oral agreement to construct a tavern for the defendant. Work commenced on the tavern that same month and defendant advanced plaintiff $500 at that time. On February 2, 1968, tho parties entered into a written agreement for the construction of the bar for the price of $38,564.24.* During the period from February 8, 1968 through June 28, 1968, defendant paid plaintiff some $43,000, substantially more than the total amount stated on the contract. These sums were paid because of oral changes made in the contract by the parties. Plaintiff's records indicate that his costs during this period of time were $48,394.08. In July 1968, defendant refused to pay plaintiff any sums in addition to the $43,000 and plaintiff then refused to proceed. Defendant paid other parties to complete the work.

> FN* 'DATE 2-2 1968
> 'It has been agreed that I, Harold Dault, build said bar for Mrs. Anthony Schulte at the price of $38,564.24.
> 'With the understanding that a third be paid when the building is started and half when the building is half done and the bal. when the building is completed.

'There is one exception that the wash tanks stoles, chairs and tables and utensils be bought and paid for by Mrs. Schultes son Tony.

'Signed Harold Dault

"Furnace	$ 2,400.00
"Well (estimate)	500.00
"Septic Tank	600.00
"Cooler installed	3,000.00
"Fill	3,365.00
"Sub Floor	1,837.63
"Block, Mortar & Sand	(2,191.20
	(1,331.24
"Roof & Interior	5,614.17
"Finish Floors	1,250.00
"Dance Floor	300.00
"Labor	11,000.00
"Windows & Doors	600.00
"Bar	800.00
"Basement Floor & Toilets	1,200.00
"Plumbing & Wiring & Lights	2,575.00
	38,564.24"

Plaintiff sued defendant to recover $5,394.08 ($48,394.08 minus $43,000). Defendant counterclaimed for $6,546 for damages sustained in completion costs. The trial judge found that the parties had, due to various changes in the contract, in effect abandoned that contract and that plaintiff was entitled to the claimed $5,394.08, less $2,270.13 that defendant was allowed on her counter-claim, or $3,123.95.

In the instant case, the following items were established as being in addition to the contract: variation in mode and amount of payment, the addition of the basement banquet room, the basement ceilings, the basement fireplace, and the finishing of the basement and the power line.

It is stated in 17 Am.Jur.2d, Contracts, § 484, pp. 954, 955:

> 'The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. An abandonment of a contract need not be express but may be inferred from the conduct of the parties and the attendant circumstances. A contract will be treated as abandoned when acts of one party, inconsistent with the existence of the contract, are acquiesced in by the other party.
> 'Abandonment of a contract is a mixed question of law and fact; what constitutes an abandonment is a matter of law, and whether there has been an abandonment is a question of fact.'

Here there were a number of 'acts of one party, inconsistent with the existence of the contract,' that were 'acquiesced in by the other party.' There was testimony in tho record to the effect that the defendant visited the job site nearly every working day. Further, that the defendant proceeded to change the plans as contained in the contract from time to time in accordance with her desires. This constituted evidence of acts which were inconsistent with the contract. The plaintiff

acquiesced and proceeded in accordance with the directions given him by defendant.

Defendant claims that the finding of the lower court that the contract had been abandoned was in error and that certain evidence as to plaintiff's time and labor costs were erroneously admitted.

Plaintiff contends that when a contract is claimed to have been abandoned or deviated from, evidence is properly admitted for purposes of explanation.

[1][2] In the instant case, the plaintiff below was trying to prove abandonment or modification of the written agreement. The party claiming such a change has the burden of proving it. Bishop Electric, Inc., v. Simpson (1967), 7 Mich. App. 391, 151 N.W.2d 900. Generally, evidence of changes in the contract, and their costs, is by necessity admissible to show the modification or abandonment of the contract. *See* Minkus v. Sarge (1957), 348 Mich. 415, 83 N.W.2d 310. Indeed, when tho burden is put on the party to introduce evidence to show a change in the contract, he must be permitted to introduce evidence to substantiate his position. It thus appears that the lower court was correct in admitting the contested evidence.

[3][4][5] After a careful review of the record, we are satisfied that there was competent evidence to support the factual finding of the trial court that there had been an abandonment of the contract. H. O. Brackney & Son v. Ryniewicz (1956), 346 Mich. 404, 78 N.W.2d 127. We are further persuaded that the contested evidence concerning the changes in the contract which resulted in the determination that the contract

had been abandoned and tho cost to the plaintiff of building the bar were properly admitted. Minkus v. Sarge, Supra. There is no showing that the lower court ruling was clearly erroneous so as to require our reversal. GCR 1963, 517.1.

Affirmed. Costs to plaintiff.

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